82-1360 NO. 82-

Office-Supreme Court, U.S.
FILED
FEB 10 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1982

JOHN W. CROSS, JERRY J. DENEGALL and FRANK WILSON, individually and on behalf of all others similarly situated,

Petitioners,

vs.

LLOYD BAXTER, HENRY KLAR, DONNIE TURNER, WESLEY BALL and SHERROD McCALL, individually and as members of the City Council of Moultrie, Georgia; WILLIAM B. WITHERS, individually and as Mayor of the City of Moultrie, Georgia; MRS. RENNIE TUMLIN, individually and as Municipal Election Superintendent for the City of Moultrie, Georgia; W.E. KELLEY, W.B. LINDEN and E.W. RHODEN, JR., individually and as Election Managers for the City of Moultrie, Georgia; and their successors in office,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether amended §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, applies to cases pending on the date of its enactment with the result that the Court of Appeals erred in refusing to consider, or remand to the District Court, Petitioners' claim that at-large elections for the Mayor and City Council of Moultrie, Georgia, resulted in the denial or abridgement of their right to vote in violation of §2?

2. Whether amended §2 created a standard for establishing a denial of voting rights different from that previously available under the Constitution?

3. Whether the Court of Appeals erred in affirming the trial court's decision that at-large elections for the Mayor and Council did not dilute minority voting

strength in violation of the Fourteenth and Fifteenth Amendments?*

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*This question will be argued in the event the Court grants the Petition for Writ of Certiorari.

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OPINIONS BELOW

The opinion and supplemental opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed are reported at 639 F.2d 1383 and 688 F.2d 279 respectively and are appended hereto at 1a and 7a.

The denial of the petition for rehearing by the panel is unreported and is appended hereto at 10a. The denial of the petition for rehearing and suggestion for rehearing en banc is reported at 693 F.2d 135, and is appended hereto at 11a.

The previous opinion of the Court of Appeals remanding the case is reported at 604 F.2d 875, and is appended hereto at 13a.

The two opinions of the United States District Court for the Middle District of Georgia are unreported and are appended hereto at 50a and 87a.

JURISDICTION OF THE COURT

The opinion and supplementary opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed were entered on March 20, 1981, and September 20, 1982, respectively. A timely petition for rehearing and suggestion for rehearing en banc was denied on November 12, 1982.

Jurisdiction to review the opinions below is conferred on this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The issues presented by this petition involve §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, appended hereto at 108a.

STATEMENT OF THE CASE

Petitioners are black citizens of Moultrie, Georgia.[1] They commenced this action on April 20, 1976, against the Mayor and City Council charging that their method of election at-large, including the use of numbered posts, staggered terms and majority vote and run-offs, diluted black voting strength in violation of the Fourteenth and Fifteenth Amendments and §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.[2] Jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331 and 1343.

1. The population of Moultrie is 14,302 people, approximately 35% of whom are black. 53a.

2. Petitioners also contended that Respondents failed to comply with §5 of the Act, 42 U.S.C. §1973c, in implementing the majority vote requirement in 1965 after the first blacks offered for city office. R. 133-34, 221-54 ("R" refers to the trial record). A district court of three judges heard the §5 claim and on May 10, 1977, enjoined further use of the uncleared practice. Cross v. Baxter, 604 F.2d 875, 878 n.1 (5th Cir. 1979), 14a, n.1.

The dilution claim was tried on the merits before District Judge J. Robert Elliot who denied relief on the grounds that "the Constitution does not require that elections must be somehow so arranged that black voters be assured that they can elect some candidate of their choice." 85-6a.[3]

Petitioners appealed and the Court of Appeals reversed. It held there was "substantial evidence, not discussed by the district court, tending to show inequality

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3. Judge Elliott has similarly ruled against black plaintiffs in other dilution cases on constitutional grounds, e.g. in Harris County, Georgia, Brown v. Reames, Civ. NO. 75-80-COL (M.D. Ga.), vacated and remanded, 618 F.2d 782 (5th Cir. 1980) and in Thomas County, Georgia, Thomasville Branch of N.A.A.C.P. v. Thomas County, Georgia, Civ. No. 75-34-THOM (M.D. Ga.), reversed and remanded, 639 F.2d 1384 (5th Cir. 1981). On remand, Judge Elliott concluded at-large elections in Thomas County were in violation of amended §2. Id., Order of January 26, 1983.

of access,"[4] that Petitioners "have demonstrated a history of pervasive discrimination and. . .have carried their burden of proving that the past discrimination has present effect,"[5] and that Petitioners

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4. Evidence of inequality of access cited by the Court of Appeals included the facts that "the all-white Lions Club supervises Moultrie City Council elections"; "after substantial numbers of blacks had begun to register and vote the City moved a polling place from a location convenient to residents of black neighborhoods to a less convenient location farther away"; "black candidates had encountered difficulties in campaigning in white neighborhoods"; and, "housing conditions, employment rates, income, and educational levels are considerably less advantageous for Moultrie blacks than for Moultrie whites." 604 F.2d at 880-81, 26-8a.

5. The Court of Appeals found "de jure discrimination in many facets of Moultrie government, including voting for public office"; [t]he number of black members on the City Council historically has been grossly disproportionate to the percentage of blacks in Moultrie's population, with only two black elected in the history of the town," both after the filing of this lawsuit and abolition of the majority vote requirement; "literacy tests were used in Moultrie until the mid-sixties"; "voting and registration were carried out on a segregated basis until the early sixties";

FOOTNOTE CONTINUED ON FOLLOWING PAGE...

"have demonstrated recent pervasive official unresponsiveness to minority needs."[6] Cross v. Baxter, 604 F.2d 875, 881, 883 (5th Cir. 1979), 27-8, 31-2, 38a. The case was remanded to the District Court with instructions to address the question of intent, an element of proof "in this circuit that...is required in voting dilution cases based on the Fourteenth and Fifteenth Amendments." 604 F.2d at 878 n.4, 17 a.

A second hearing was held on January 25, 1980, and Judge Elliott once again

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FOOTNOTE CONTINUED..."Moultrie schools were fully desegregated only in 1970"; and "public recreational facilities segregated by law unit 1968 or 1969." 604 F.2d at 881, 30-1a.

6. The Court of Appeals noted "that recreational facilities in the black areas of town are inferior to those in white areas"; "public housing projects were constructed in the 1950's that were segregated by law when built and that remain largely segregated today"; and cited "segregated voter lists"; "the city's delay in complying with requirements of §2 to the Voting Rights Act of 1965"; "operation of racially segregated jails, and racially selective enforcement of laws by City police." 604 F.2d at 883, 39-41a.

denied relief. 87 a.[7] The Court of Appeals affirmed. It held that "to maintain a voting dilution action...a plaintiff must establish that the governmental body in question is unresponsive to its

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7. Half of the court's opinion was devoted to showing that the Council was not unresponsive to minority needs. Although unresponsiveness is not a part of a plaintiff's case under §2, see p.15 infra, the factual premises upon which the District Court based its conclusion are clearly erroneous. For example, the court found there was "no high degree of de facto segregation in public housing in Moultrie." 100a. The evidence shows, however, that the 204 units of public housing in northwest Moultrie, a black area of town, are, and always have been, occupied exclusively by blacks. By the same token, in the public housing on the white side of town, there is only one black family in residence. R. IV 52-3, 126-27. The District Court also found that the failure to preclear the majority vote requirement "in fact operated to Plaintiff's advantage." 100a. Given the facts that the majority requirement excluded a plurality winning black from office in 1973, and a black first became elected to the Council only after abolition of the majority vote requirement, the court's finding is, quite simply, incredible. R. I 139-40, R. III 38-9.

legitimate needs," Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981), 3 a, and that since the District Court found Petitioners had failed to prove unresponsiveness, a finding it deemed not clearly erroneous, Petitioners were absolutely foreclosed from obtaining relief under the Constitution. Petitioners' §2 claim was rejected because the court concluded it provided no protection different from that contained in the Constitution itself.[8]

Petitioners filed a suggestion for rehearing en banc on the grounds that

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8. Cross II was one of three companion cases heard and decided by the panel: Cross was decided in favor of the defendants, Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), aff'd sub nom. Rogers v. Lodge, __U.S.__, 102 S.Ct. 3272 (1982), was decided in favor of the plaintiffs, and Thomasville Branch of NAACP v. Thomas County, Georgia, 639 F.2d 1384 (5th Cir. 1981), was reversed and remanded for further proceedings. It was in the Lodge opinion, which was made applicable to Cross, that the court ruled §2 did not provide a remedy for conduct not covered by the Constitution. 639 F.2d at 1364 n.11.

Cross II conflicted with McMillan v. Escambia County, Florida, 638 F.2d 1239, 1249 (5th Cir. 1981), which held that responsiveness is "simply irrelevant" in vote dilution cases, and Toney v. White 476 F.2d 203, 207 (5th Cir. 1973), aff'd en banc, 488 F.2d 210 (5th Cir. 1973), which held that any intention to discriminate was not required for a violation of §2. The suggestion was held in abeyance pending resolution by this Court of the appeal in the companion case of Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), aff'd sub nom. Rogers v. Lodge, __U.S.__, 102 S.Ct. 3272 (1982).

On June 29, 1982, President Reagan signed an act amending §2 which provided, effective immediately, that voting practices are unlawful under the statute which result in the denial or abridgment of the right to vote on account of race

or color. 108a. Two days later, on July 1, 1982, this Court decided Rogers v. Lodge, supra, which clarified the proof standards in constitutional voting rights challenges, and expressly reversed the ruling by the panel that proof of unresponsiveness was an essential element of a claim of vote dilution. 102 S.Ct. at 3280 n.9.

Petitioners renewed their pending motion for rehearing before the panel, stressing the controlling importance of the intervening amendment of §2 and the decision in Rogers v. Lodge, supra. The motion was denied without additional briefing or oral argument. 10a. On September 20, 1982, the panel, in a two page per curiam supplemental opinion, held the trial court's additional findings were not clearly erroneous and that Petitioners were not entitled to relief notwithstanding

Rogers. 7 a.[9] There was no discussion

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9. In concluding there was no unconstitutional denial of equal access, the District Court ignored much of the evidence, e.g. that Respondent Ball freely admitted "the primary thing" that had caused black candidates to lose in local elections was their race: "It's been on racial lines," R. IV 67-8; the uncontradicted evidence of slating, see n.15, infra; the imposition--without preclearance--of a literacy test in 1979 for new poll workers, the effect of which was to screen blacks under a new and more onerous standard than had been in effect when elections were run exclusively by the all white Lions Club, whose members continue to be grandfathered in as poll workers, R. IV 31-5, 40, P. Ex. II D; that the Lions Club has a history of discourtesty to blacks and turned away registered black voters from the polls in 1979, R. IV 239; the timing and effect of the majority vote requirement, see n.7, supra; the impact of the existing numbered post system; that Petitioner Cross was not consulted until after the Respondents had relocated the polling place to a location more distant from the black community, and that while Cross had no objection to voting being conducted at the new site, his preference was "to have polling places in all the areas that they have," R. IV 211; segregation in clubs, churches, private schools, the Junior Chamber of Commerce and business patronage, R. III 48-9, 92, 94-5, P. Exs. 37, 40, 44; and the rich evidence of racial polarization in voting. R. 136, 139-40, 269-70, R. II 296, R. III 102, P. Exs. 4, 11 A, B, C.

whatsoever of §2. Petitioners filed a second suggestion for rehearing en banc requesting the court to consider their §2 claim. The suggestion was summarily denied on November 12, 1982.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Failure to Apply Section 2 of the Voting Rights Act As Amended to Petitioners' Case Deprived Them of Due Process and Presents an Issue of Exceptional Importance.

The Court of Appeals refused to consider, or remand to the District Court, Petitioners' claim that at-large elections for the Mayor and Council of Moultrie, Georgia, violate §2 of the Voting Rights Act, 42 U.S.C. §1973. Section 2, amended by Congress on June 29, 1982, is a new standard for determining voting rights violations, and Petitioners, having properly pled the statute in their com-

plaint, were entitled to have it applied to their case.

It is well-established that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). Accord, United States v. Alabama, 362 U.S. 602, 604 (1960).[8] The legislative history of the 1982 Act makes

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8. The Court of Appeals has complied with the rule in other cases. See e.g. Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. 1981) (specially concurring opinion of Judge Goldberg) ("due process and precedent mandate that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations.") (emphasis added); Brown v. Reames, 618 F.2d 782 (5th Cir. 1980).

clear beyond any doubt that Congress intended for the new statute to apply to pending cases. See 128 Cong. Rec. S7095 (1982) (remarks of Senator Kennedy) ("Section 2. . .will take effect immediately, and will, of course, apply to pending cases in accordance with the well established principles of Bradley v. City of Richmond, 416 U.S. 686 (1974) and United States v. Alabama, 362 U.S. 602 (1960)"); 128 Cong. Rec. H3841 (1982) (remarks of Representative Sensenbrenner) ("Section 2. . .will take effect immediately, and will, of course, apply to pending cases."). Moreover it would be a manifest injustice not to apply §2 to pending cases given Congress' overriding purpose in amending the Voting Rights Act to remedy the continuing effects of past discrimination in the electorate. Senate Rep. No. 97-417, 97th Cong., 2d Sess., 40 (1982) (herein-

after "Senate Rep."); House Rep. No. 97-227, 97th Con., 1st Sess., 31 (1981) (hereinafter "House Rep.") ("These Section 2 Amendments also provide an appropriate and reasonable remedy for overcoming the effects of this past purposeful discrimination against minorities.").

Section 2 provides that voting practices which result in the denial or abridgement of the right to vote on account of race or color are unlawful. 108a. In determining a violation under the results test of §2, Congress explicitly provided that the standard of proof was significantly different from that under the Constitution:

a. Proof of discriminatory purpose is not required to establish a violation of the statute, regardless of the standard of proof applicable in constitutional challenges. Senate Rep., 27-30; House

Rep., 28-32.[11] Cf. City of Mobile v. Bolden, 446 U.S. 55 (1980).

b. Unresponsiveness is not an element of a statutory violation, whatever its relevance in constitutional cases. Cf. Rogers v. Lodge, supra, 102 S.Ct. at 3280 n.9. Indeed, Congress provided that the use of responsiveness is to be avoided because it is a highly subjective factor which creates inconsistent results in cases presenting similar facts. Senate Rep., 29 n.116 ("The amendment rejects the ruling in Lodge v. Buxton and companion cases that unresponsiveness is a requisite

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11. The Senate as a whole adopted the version of the Act reported out of the Committee on the Judiciary, which was in turn adopted in whole by the House of Representatives, with the understanding that the effect of the §2 amendment was identical under either the original House bill or the Senate bill. 128 Cong. Rec. H3839-46 (1982).

element."); House Rep., 29 n.94, 30 ("The proposed amendment avoids highly subjective factors such as responsiveness of elected officials to the minority community.")

c. Foreseeability of consequences, while of apparently doubtful relevance to a constitutional violation, City of Mobile v. Bolden, supra, 446 U.S. at 71 n.17, is "quite relevant evidence" of a statutory violation. Senate Rep., 27 n.108.

d. Whatever limitations may exist on the scope of the constitutional bar against indirect intereference with the right to vote, see e.g. City of Mobile v. Bolden, supra, 446 U.S. at 65, and Rogers v. Lodge, supra, 102 S.Ct. at 3276 n.6, Section 2 embodies a functional view of the political process and prohibits a very broad range of impediments to minority participation in the electorate. Senate Rep., 30 n.120.

Not only is the §2 standard, which dispenses with the requirement of proof of racial purpose, less rigid and more lenient than that which the plurality in City of Mobile v. Bolden, supra, found under the Constitution, but the legislative history of the Act shows that Congress by specific reference to Cross v. Baxter I and II, supra, intended for the kind of evidence in this case to establish a violation of the statute, whatever the result under the Constitution. See Senate Rep., 39: "In Cross v. Baxter, a challenge to elections in Moultrie, Georgia, was rejected even though the evidence showed pervasive discrimination in the political process."

The evidence in this case, based upon facts which are uncontradicted in the record, establishes virtually every one of the factors identified

in the legislative history as illustrative of those which should prove a violation of amended §2, e.g. history of discrimination--particularly in registering and voting,[12] polarized voting,[13] racial

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12. This history was so gross and apparent that the District Court chided Petitioners' for devoting such "considerable time and effort in 'proving' a matter which required no proof and of which the Court takes judicial notice." 79 a. The Court of Appeals found that discrimination in Moultrie was "recent and pervasive". 604 F.2d at 881, 30a. See the evidence discussed by the court at n.5, supra, of the use of literacy tests, segregated voting, etc.

13. While the District Court found that whites in Moultrie do not vote "strictly" along racial lines, 55 a, the Court of Appeals concluded that the finding "on this record would be clearly erroneous" if the "district court intended to find that there is such an absence of racial bloc voting in Moultrie that a finding of dilution is foreclosed....No black candidate has ever received even a plurality of white votes and Wilson, the first black elected to the Council [after abolition of the majority vote requirement] appears to have received as little as 5% of white votes." 604 F.2d at 880 n.8, 24a. Evidence of bloc voting was the basis of the Department of Justice's objection when the majority vote requirement was submitted following the three-judge court's ruling in 1977. R.II 314-16.

campaign tactics,[14] slating,[15] disproportionate number of blacks elected to

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14. The District Court found in its supplemental opinion that "some black candidates have not felt comfortable in campaigning house to house in white neighborhoods." 94a. Also see 604 F.2d at 881, 28a, citing "evidence that black candidates had encountered difficulties in campaigning in white neighborhoods." The significance of race in local elections was graphically illustrated by a sign erected on the place of business of a defeated white candidate the day after the 1979 elections: "got beat by a black man--business for sale--leaving town." R.IV 189.

15. The evidence of slating, not discussed by either court below, involved blatant "cuing" by the white electorate in two elections. In the first, one of two white candidates withdrew from the May 23, 1978 election for Council Post 5 after a black entered the race, insuring that the black could not be elected by receiving less than a majority of votes as had happened following invalidation of the majority vote requirement by the three-judge court. Cross v. Baxter, supra, 604 F.2d at 878 n.1, 14a, R.II 296, R. III 102. The black candidate was defeated. P. Ex. II A, B, C ("P. Ex." refers to Petitioners' trial exhibits). In the second election held the following year, according to the uncontradicted testimony of a local white businessman and former candidate for public office, "most FOOTNOTE CONTINUED ON NEXT PAGE...

office,[16] distinctive minority socio-economic status,[17] past use of a majority vote requirement and present use of staggered terms and numbered posts.[18] Senate Rep., 28-9; House Rep., 30.

FOOTNOTE CONTINUED...businessman around... white businessmen" cued on a black candidate--a retired former waiter at a local hotel who had a seventh grade education and was a total political novice--for Council Post 3 to insure his election in order to give the appearance of racial fairness to city elections and thus defeat Petitioners' dilution lawsuit. R. IV 42, 56-8, 187-89.

16. The District Court in its supplemental opinion found "there has been an unquestioned disparity between the number of residents and the number of minority representatives" on the Moultrie City Council. 97 a.

17. The District Court also found in its supplemental opinion "the existence of socioeconomic inequities" between the races in Moultrie. 95 a. Also see n.4, supra.

18. 604 F.2d at 878 and n.1, 14 a.

Although Petitioners produced abundant and convincing evidence of a violation of amended §2, the District Court dismissed the complaint and the Court of Appeals affirmed without considering the §2 claim. Moreover, both courts applied standards developed in constitutional cases which Congress has determined are not applicable in statutory challenges under §2. Both courts, for example, placed heavy emphasis on unresponsiveness. The District Court devoted half of its supplemental opinion to the issue while the Court of Appeals devoted the entirety of its March 20, 1981, opinion and very nearly all of its September 20, 1982, opinion to unresponsiveness, concluding with reference to Rogers v. Lodge, supra, that "unresponsiveness is an important element" in determining minority vote dilution. 639 F.2d at 1383, 8a. Not only is unresponsiveness not an element of a

statutory violation, but Petitioners were required to prove racial purpose, a burden flatly inconsistent with Congressional intent in amending §2. The lower court found Petitioners had failed to prove intentional discrimination in the adoption or maintenance of at-large elections in Moultrie, but it did not, and could not on the record in this case, find that such elections do not result in the denial or abridgment of the right to vote.

The failure of the Court of Appeals to consider Petitioners' §2 claim, or remand to the District Court, deprived Petitioners of important rights conferred upon them by Congress. This deprivation justifies the grant of certiorari, and either full review in this Court or an order remanding to the Court of Appeals for reconsideration under the standards

of §2 as amended.

CONCLUSION

For the foregoing reasons, this Court should issue the writ of certiorari, and (1) summarily reverse the opinion and judgment below, (2) vacate and remand for further consideration of Petitioners' claim under §2, or (3) set the case for argument.

Respectfully submitted,

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